

PUBLIC INPUT

ON THE “DRAFT REVISED UDC DATED 1/3/05”.

- 1) “Vested Rights Task Force Comments & Questions”
- 2) “AGUA Recommendations” dated 1/19/05
- 3) “The Real Estate Council of San Antonio Recommendations & Comments” addressed to Chairwoman Susan Wright.

Vested Rights Task Force Comments & Questions

1. **§35-712(b), Contents of a Project Affidavit** – Is a plat with multiple lots a “multi-phase” project?
2. **§35-714, Projects Initiated on or after September 25, 1997 and before June 4, 2001** – This section allows the submittal of a project affidavit “at any time”. What is meant by “at any time”? After eighteen (18) months?
3. **§35-714, Projects Initiated on or after September 25, 1997 and before June 4, 2001** – Why does this section apply only to projects initiated by plat applications filed between September 25, 1997 and June 4, 2001?
4. **§35-718, Completion of a Project** – Is it the City’s intent that a valid POADP or other permit with no expiration date shall expire twenty (20) years after the approval date, retroactively creating an expiration date for the permit?

The City has created a two-prong test to set a project completion date for certain projects: 1) Does the underlying permit have an expiration date? If the answer is no, then 2) the project is complete twenty (20) years after the permit was approved, provided that progress has been made toward the completion of the project.

Chapter 245 allows the City to determine that a project is dormant and to set an expiration date for permits with no expiration date if no progress has been made toward the completion of the project. However, Chapter 245 does not allow the City to arbitrarily and retroactively set an expiration date of twenty (20) years even though progress has been made toward completing the project. The City has no statutory authority under Chapter 245 to set an expiration date for permits under which satisfactory progress has been made toward the completion of the project.

Example: A number of POADPs approved in the early to mid-1980s, such as the Dominion, Stone Oak, and Crownridge, are still being developed. The developers of these projects could not anticipate that their POADPs would expire due to an ordinance adopted in 2005. In each of these examples, the project has demonstrated sufficient progress toward the completion of the project as required by Chapter 245.

5. **§35-718, Completion of a Project** – Does a building permit have an expiration date (6 months)? If the first permit for a project is a building permit, does the project lose vested rights when the building permit expires?
6. **§35-719(d) Permit for Dormant Project**
 - a) Does this section apply to any permits approved after May 11, 2000? The draft ordinance states that the dormancy provision applies only to permits that on May 11, 2000 had no expiration date and have become dormant. Under this provision, this section would not apply to permits issued after May 11, 2000.
 - b) Could any project on a lot platted prior to May 11, 2000 be considered a dormant project? Doesn’t a plat in and of itself demonstrate progress toward completion of the project?

7. **§35-718, Completion of a Project and/or §35-719(c), Expiration of Permit for a Dormant Project**
- a) Is it the City's intent that, if a permit has been declared "expired" by the City under either §35-718 or §35-719, the property owner must replat the property to comply with all current ordinances?
 - b) If a project was initiated through plat application, and the plat created twenty (20) lots, and fifteen (15) of these lots were developed prior to the "expiration" of the permit, would the remaining five (5) lots lose vested rights?
8. **§35-719, Permit for a Dormant Project** – Since the proposed ordinance would impose a test for dormancy, the City has imposed upon itself the burden to show that the project is dormant. Under Chapter 245, the City's power to establish an expiration date is conditional: the City may only establish an expiration date for a permit if the permit has no expiration date and no progress has been made toward the completion of the project. The City must establish both conditions before it can declare a project dormant.



RECOMMENDATIONS ON “VR- UDC AMENDMENT- DRAFT FROM ANDY 1-3-05.PDF”

January 19, 2005

Sec. 35-711 (d) Appeals of vested rights decisions

AGUA reiterates its position that citizens should have the ability to appeal vested rights decisions. Case law on standing before the Board of Adjustment does not argue for denial of this right. Because the Tree Preservation and Aquifer Protection ordinances were adopted to protect the health of the entire City, not just adjacent landowners, then every citizen of San Antonio should have the ability to appeal these decisions.

Sec. 35-712 Project affidavit

(b) Contents of a Project Affidavit

In general, the affidavit is lacking in specifics and detail about the project. What precedents are there for such an affidavit? Have other Texas cities created similar procedures?

In formulating the project affidavit, it is instructive to consider this question - What is a development project?

When a developer commences a project he:

- has an engineer/architect/planner create a development plan
- arranges for financing
- purchases the land
- lines up home builders interested in building on the residential tract
- lines up commercial interests interested in tenancy
- plats lots for retail/commercial, apartments, and homes
- proceeds with securing permits for land clearing, road building, utility construction, etc.

What is not a project?

- in anticipation of an impending new regulation, a landowner files a development plan for purposes of getting an exemption from that new regulation. Dozens of other landowners do the same, as evidenced by the blizzard of filings that precede most new regulations.
- the plan contains only the sketchiest information (ie. the proposed “project affidavit”) so as to allow the developer freedom to change it without losing the sought for exemption when he actually begins developing his project 5, 10, or 20 years later
- the plan becomes a lucrative investment, since the “rights” that attach to it are valuable currency. Filing development plans is a speculative game whereby landowners increase the value of their land by virtue of grandfathering.

The following information should be required on an affidavit:

- preliminary site plans showing at least the information required for a Master Development Plan
- value of developer's expenditures-to-date in the project, categorized as to:
 - expenditures for planning and engineering
 - expenditures for infrastructure
 - expenditures for financing
- contracts, receipts, and other documents evidencing expenditures and/or arrangements for:
 - financing/loans
 - construction
 - planning/engineering
- proposed zoning districts (ie: C-3, R-6, I-2)
- developer's anticipated total investment, according to proposed zoning districts
- number of lots (commercial, residential, multi-family, industrial)
- specific land uses (i.e. retail, auto repair, home improvement center, big box retail, corporate offices)
- approximate square footage of buildings
- number of dwelling units
- lane miles of local, collector, and arterial streets

(d) Filing with application for utility service commitment

Filing of an affidavit in connection with utility service commitments should not be allowed. Such commitments do not establish statutory vested rights. Since the commitments can only be used to assert common law rights, the affidavit serves no purpose to the applicant or the City. Such an affidavit will result in unjustifiable recognition of statutory vested rights where only common law rights exist.

(f) Failure to file a project affidavit

This section should be eliminated. The legality of this section with respect to Chapter 245 is questionable. Instead, the affidavit should be made part of the Application Submittal requirements in UDC Appendix B.

Sec. 35-713 Certain projects initiated before September 25, 1997

(a) Applicability

It is important to note that vested rights are not created by either a development rights permit (DRP) or a vested rights permit (VRP). It is entirely the applicant's option to apply for such permits, and as such, they are not "grandfatherable" permits under Chapter 245. In other words, such permits are not required to initiate, continue, or complete a project and so are not a "permit" as the term is defined in Chapter 245.

Vested rights are established only by applications to execute a development project and can be lost if the project changes. Neither DRPs nor VRPs establish a project, they are simply recognitions of vested rights granted by the State.

If an applicant has made substantial investments in reliance on one of these permits, then he may have an estoppel claim against the City. Such a claim would have to be evaluated apart from a vested rights claim.

In addition, the following language should be added to any section of this ordinance that contains the term "permit".

Wherever the term "permit" is used, the definition of that term is the same as in Local Government Code Chapter 245.

(b) Project affidavit to confirm project as of September 24, 1997

This section serves one purpose only, to exempt projects without vested rights from the 2001 UDC and 2003 Tree Preservation Ordinance. Any applicant with a valid vested rights claim will file under Sec. 35-712.

Retroactive filing of project affidavits will substantially increase the quantity of grandfathered projects and should not be allowed. Vested rights claims should be evaluated solely on the basis of the information submitted with the first permit application.

Sec. 35-714 Project initiated on or after September 25, 1997 and before June 4, 2001

Projects initiated in this time period should stand entirely on the initially submitted documentation. Filing of retroactive project affidavits should not be allowed.

Projects initiated prior to June 4, 2001 should be grouped into two categories:

1. Projects where significant investment was made in reliance on a Development Rights Permit.
2. Projects that either did not receive a DRP or did not make significant investments in reliance on a DRP.

***Sec. 35-715 Project initiated on or after June 4, 2001 and before
[the effective date of these proposed amendments]***

(b) Recognition of project

New certificates should be issued only to projects with currently valid vested rights claims. Therefore, we suggest the following revision:

A claim made under this section shall be processed pursuant to Section 35-711; provided, however, that upon request of any applicant who was issued a development rights permit or a vested rights permit by the City of San Antonio for that project before *[the effective date of these proposed amendments]*, the Director shall review the validity of the old development or vested rights permit and, if determined to be currently valid, issue the certificate required by subsection (b)(3) or (b)(4) of Section 35-711, as applicable.

35-717 Modification to project affidavit

Since retroactive filing of project affidavits should not be allowed, this section should be renamed to “*Changes to a project*”. Changes to a project should be limited in both quantity and scope.

(a) Limited change in acreage proposed for previously identified use

Changes in size of any area within a development plan should be limited to 3%. Any change should be measured with respect to the *original* development plan, not with respect to the most recent version of the plan.

Changes in number of buildings, floor area, number of dwellings

A 5% or smaller change in any of these aspects should not constitute a change in project.

Changes in proposed zoning districts

Changes in zoning districts should be limited to one plan revision. In other words, after the zoning district for a particular area within a development plan has been revised, no further such changes should be allowed.

(b) Minor amendment to a Master Development Plan

The existing “Minor amendment” criteria in the UDC should be changed. Decreases in density and number of lots should not be allowed.

(c) Changes caused by government action

What is the basis in state law for this section? This section is too vague and broad. It should be either eliminated or the specific “government actions” should be precisely delineated. Otherwise it will result in exploitation and creation of unwarrantable vested rights.

(d) All other project changes

This section contains an interpretation of Chapter 245 that should be eliminated. It unnecessarily restricts the City from exercising discretion in determining when the cumulative result of all changes constitutes a new project. Certainly, at some point, the City should be able to decide that vested rights for an entire “project” have been lost. There is nothing in state law granting the sort of “piecewise” grandfathering enabled by this section.

(e) Abandonment or loss of investment

An additional section should be added dealing with abandonment or loss of investment. Where the original developer abandons an investment in a project by, for example, relinquishing rights to water or sewer capacity, any new project on that land should be subject to current regulations. In addition, where the original project is abandoned because of bankruptcy or other adverse financial circumstances, vested rights should not be recognized.

35-718 Completion of a project

Completion of a project and expiration of a permit are distinct events and should be dealt with separately. This section confuses these events along with the consequences. City code already deals with expiration of permits and the consequences of this event, therefore, there is no need for additional language dealing with expiration of permits.

Definition of project completion is necessary so that expansion and redevelopment, which were not part of the developer’s original project, may be subject to current regulations.

(a) Project completion

This section should define only what *does not* constitute a complete project. We recommend the following criteria:

Single-family subdivision: A single-family subdivision is not complete where any of the following criteria are met:

1. No building construction, infrastructure construction, or site work has been performed, or
2. It has been less than 2 years since a dwelling was constructed on a vacant lot.

Commercial/industrial/multi-family projects.

The project on a platted lot planned for commercial/industrial/multi-family use is not complete where any of the following criteria are met:

1. No building construction, infrastructure construction, or site work has been performed, or
2. It has been less than 2 years since a building was constructed on a vacant lot, or
3. It has been less than 1 year since a building larger than 2,000 square feet floor area was completed on a lot.
4. Complete construction drawings for a building larger than 2,000 square feet floor area exist for that lot.

The project planned for a unit of a Master Development Plan is not complete where any of the following criteria are met:

1. No building construction, infrastructure construction, or site work has been performed within that unit, or
2. It has been less than 2 years since a building was constructed on a vacant lot within that unit, or
3. It has been less than 1 year since a building larger than 2,000 square feet floor area was completed on a lot, or
4. Complete construction drawings for a building larger than 2,000 square feet floor area exist for that unit.

35-512 Streetscape Planting Standards

We are opposed to this amendment in its entirety. First, such an amendment to the development code is outside the scope of the task force's charge. Second, its effect will be to exempt every project permitted before 2005 from the streetscaping standards. In other cities, such as Austin, 1% of all capital improvement funding, spent for additional lane miles of streets, is dedicated to streetscaping. Streetscaping is an integral part of the street standards, since it impacts clear vision areas and overhead utilities. It should remain a part of the street standards.

Doc # 3

The Real Estate Council of San Antonio

8706 Lockway
San Antonio, Texas 78217

Ms. Susan Wright
Chair, Vested Rights Task Force
City of San Antonio
1901 South Alamo
San Antonio, Texas 78204

VIA HAND DELIVERY

RE: Recommendations & Comments on Proposed Revisions to Division 2,
Article VII of the Unified Development Code (Vested Rights)

Dear Chairwoman Wright:

On behalf of the Real Estate Council of San Antonio, let me thank you and the other members of the City of San Antonio ("City") Vested Rights Task Force for your time and commitment to addressing stakeholder concerns related to the recognition of development rights under Chapter 245 of the Texas Local Government Code. Our members have previously provided input on many of these concerns at public meetings of the Vested Rights Task Force, and we appreciate your consideration of our comments.

We have reviewed the proposed changes to Division 2, Article VII of the Unified Development Code ("UDC"), dated January 3, 2005. This letter summarizes our comments on these revisions and proposes some modifications and clarifications to the final draft. Our proposed clarifications are consistent with our understanding of the intent of the Vested Rights Task Force to simplify the recognition process.

Our recommendations relative to the substantive provisions of Article VII, Division 2 are as follows:

1. **§35-711(d)(1), Appeal to Planning Commission** – "Planning Commission shall hold a hearing on the appeal and make its ruling no later than forty-five (45) days after the date the appeal was filed."
Recommendation – Delete "forty-five (45) days" and insert "fourteen (14) days".
Rationale – The Planning Commission meets twice a month. The City does not need forty-five (45) days to place an item on the Planning Commission agenda. Appeals should be processed in a timely fashion.
2. **§35-711(d)(2), Review by City Council** – City Council review of the Planning Commission decision may be requested by the applicant, the City Manager, or via Council consideration.
Recommendation – Delete "City Manager".
Rationale – If City staff has denied recognition of vested rights and the Planning Commission determines that staff was incorrect, staff should not be permitted to appeal the Planning Commission's decision.

3. **§35-711(d)(2), Review by City Council** – A Council Consideration Request, signed by the requisite number of City Council members, may request an appeal of a Planning Commission decision.
Recommendation – Clarify that the Council Consideration Request must be signed by at least six (6) City Council members.
Rationale – A request to review a decision of the Planning Commission should be supported by the majority of City Council members.
4. **§35-711(d)(2), Review by City Council** – The City Council hearing on the appeal must be held within thirty (30) days of the Planning Commission decision.
Recommendation – Delete “thirty (30) days” and insert “fourteen (14) days”.
Rationale – The City Council meets every week. The City does not need thirty (30) days to place an appeal on the City Council agenda.
5. **§35-711(d)(2), Review by City Council** – “A decision of the Planning Commission is final forty-five days after the date of the decision . . .”
Recommendation – Delete “forty-five days” and insert “fourteen (14) days”.
Rationale – The purpose of the proposed revisions is to simplify the process. If a decision by the Planning Commission is not final for forty-five (45) days, the property owner will have no certainty as to his rights for more than six weeks from the Planning Commission decision.
6. **§35-712(b)(6), Contents of Project Affidavit (Land Uses)** – The land uses that may be identified on the project affidavit include: farm & ranch; residential; multi-family; office; commercial; hotel or recreation; industrial; and institutional.
Recommendation – Delete “hotel or recreation” and insert “entertainment”.
Rationale – Hotel uses should fall within the commercial category. The entertainment category would include uses such as those found within the “ED” Entertainment District zoning.
7. **§35-712(b)(6), Contents of Project Affidavit (Land Uses)** – The land uses that may be identified on the project affidavit include: farm & ranch; residential; multi-family; office; commercial; hotel or recreation; industrial; and institutional.
Recommendation – Insert “Mixed-Use” category.
Rationale – Certain zoning districts, such as the D and MXD zoning districts, and certain Article II use patterns, allow for and encourage a mixture of uses. In addition, several uses may occur within the same building. For example, within a “C-2” zoning district, a project may consist of a single building with commercial uses on the ground level, with multi-family and office on upper stories. A “Mixed-Use” category is consistent with the UDC.
8. **§35-712(d), Filing with Application for Utility Service Agreement** – “Failure to file a project affidavit ... in connection with an application ... establishes a presumption that the application for utility service commitment was not intended to

initiate a specific or identifiable project and that the applicant does not intend to identify a project for purposes of this Division”.

Recommendation – Delete “establishes” and insert “shall not establish”.

Rationale – Failure to submit a project affidavit cannot establish a presumption with regards to vested rights under state law. This provision would not withstand judicial scrutiny and contradicts the intent of the legislature in establishing protection for projects upon the filing of the application for the first required permit.

9. **§35-712(f), Failure to File a Project Affidavit** – “Failure to file a project affidavit in connection with a permit establishes a presumption that the applicant for the permit is not initiating a continuing project, and that a permit application is sought to achieve only the action authorized by the issuance of the permit.”

Recommendation – Delete “establishes” and insert “shall not establish”.

Rationale – Failure to submit a project affidavit cannot establish a presumption with regards to vested rights under state law. This provision would not withstand judicial scrutiny and contradicts the intent of the legislature in establishing protection for projects upon the filing of the application for the first required permit. This provision would create a presumption that a Master Development Plan (“MDP”), for example, was only intended to indicate uses, and no further development would occur within the project area.

10. **§§35-713 – 35-716, Recognition by Project Initiation Date** – These sections describe the process to register or continue recognition of vested rights based on the date that the project was initiated, and whether the project has received a vested rights determination.

Recommendations – These sections raise several questions that should be addressed:

- a) *Why is the process different based on project initiation date?* Either the City has previously recognized vested rights through a development rights permit or vested rights permit, or the City has not yet made a determination. If a determination has previously been made, the property owner should be able to file a project affidavit at any time.
- b) *Why is §35-714 limited to plat applications?*
- c) *Why is the vesting date in §35-713(b) September 24, 1997?* The date should be the date that first application for a required permit for the project was submitted to a regulatory agency.

Rationale – The process for recognition of vested rights should not be difficult to understand or complete for property owners.

11. **§35-717(a), Limited Change in Acreage Proposed for Previously Identified Use** – This section allows for an increase in use category acreage of up to ten percent (10%). If the increase in use acreage exceeds ten percent (10%), the vested rights protections do not apply to the area of increase.

Recommendation – Clarify that the only portion of the project that loses vested rights protection is the area that exceeds the ten percent (10%) increase. For example, if the commercial acreage within a MDP were increased by fifteen percent (15%), the only area that would lose vested rights protection based on the MDP would be the additional five percent (5%) of commercial acreage.

Rationale – The use areas identified on a permit that remain consistent with the permit should not lose vested rights protection.

12. **§35-717(d), All Other Project Changes** – “Development of the remainder of a project that conforms to the original project affidavit . . . is not a new project.”

Recommendation – Delete “conforms” and insert “is consistent”.

Rationale – This change provides greater clarity.

13. **§35-718, Completion of a Project** – This section provides that a project is complete when the permit expires. If the permit has no expiration date, the project is complete twenty (20) years after the first permit was approved. The project must show progress based on MDP validity standards.

Recommendations:

- a) Clarify that a plat would be a valid permit for purposes of vested rights for twenty (20) years after the plat approval date. No additional progress would be required because one hundred percent (100%) of the project area is platted.
- b) Insert the MDP progress requirements into this section:

An approved permit shall remain valid in accordance with the following time frame:

A. The permit shall expire unless a final plat is approved within eighteen (18) months from the approval of the permit that plats, at least twenty (20) acres or eight (8) percent of the net area of the permit area or that requires at least five hundred thousand dollars (\$500,000.00) in infrastructure expenses if the project area is one thousand (1,000) acres or less or at least one million dollars (\$1,000,000.00) if the project area is more than one thousand (1,000) acres.

B. Further, an approved permit shall expire unless fifty (50) percent of the net area within the project area is the subject of final plats or development within ten (10) years from the date of approval of the permit. The remaining fifty (50) percent must obtain final plat approval or be developed within ten (10) years after the initial fifty (50) percent of the net area within the project area has been platted or developed.

Rationale – A property owner should have a clear understanding of the expiration date of the permit that initiated the project if the permit does not have an expiration date.

14. **§35-720(b)(4), Procedure for Review and Approval of a Consent Agreement –**
This section creates a process to apply for, draft, and approve a consent agreement. However, there are no time limits on the City review process.
Recommendation – Insert “The Director shall review an application filed under this section and approve, deny, or make a written request to the applicant for specific additional information needed to complete the review no later than twenty (20) days after the date the application was filed. The Director may extend any time period established by this section for the review or appeal of an application at the written request of the applicant.”
Rationale – This allows a consent agreement to be processed in the same fashion as a vested rights permit application.
15. **§35-720(b)(5), Procedure for Review and Approval of a Consent Agreement, Denial by Director –** “The Director may deny a request for a consent agreement if the Director, after consulting with the City Attorney, determines the applicant has not provided the credible evidence required by subsection (4) of this section. A denial under this subsection is a final action with no further administrative review.”
Recommendation – Delete the last sentence and insert “The applicant may appeal the decision of the Director to deny the application for a Consent Agreement in accordance with the provisions of §35-711(d).”
Rationale – This would permit the Planning Commission to review the Director’s decision and is consistent with the process for reviewing vested rights applications.
16. **§35-720(b)(7), Procedure for Review and Approval of a Consent Agreement, Review and Approval by City Council –** “A decision of the Planning Commission is final forty-five days after the date of the decision...”
Recommendation – Delete “forty-five” and insert “fourteen (14)”.
Rationale – The applicant should not be required to wait forty-five (45) days for a final decision.
17. **Ordinances Exempted from Chapter 245 –** The City has not produced a list of ordinances which are exempt from Chapter 245.
Recommendation – The City should create a list of ordinances which are exempt from Chapter 245, i.e. ordinances which apply regardless of vested rights.
Rationale – The list of exempt ordinances will allow quicker review of projects with vested rights.
18. **Notification –** The proposed revisions would create certain deadlines for property owners to register vested rights, and creates permit expiration dates for permits that currently do not have expiration dates. The proposed revisions do not provide for notification to affected property owners and permit holders.
Recommendation – The City should send notification to property owners and to permit applicants of the new vested rights policies and procedures. Holders of permits with no expiration date should be notified that the City has assigned an

expiration date. The notification should include the new expiration date of the permit.

Rationale – It is fundamentally inequitable to ongoing projects for the City to adopt deadlines and permit expiration dates without informing property owners and permit holders.

If you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Norman Dugas", is written over a horizontal line. The signature is stylized with a large "N" and "D".

Norman Dugas